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IN THE

Supreme Court of the United States

October Term, 1944. No. 1103

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, Deceased,

Petitioner,

against

READING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

GEORGE GILDEA,
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No.

GRAZIA FANTINI, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF GRAZIO FANTINI, DECEASED,

Petitioner,

against

READING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

ARGUMENT.

Point (1).

There Being No Evidence of Negligence the Trial Court Properly Directed a Verdict for the Respondent.

The petitioner's intestate was employed by the respondent as a crossing watchman at the Tulpehocken Street crossing in West Reading, Pennsylvania. He was struck by a passenger train a little after daybreak on January 12, 1942. (A 24, 29) The train was traveling in an easterly direction on the westbound track. (A 28) It was cliamed in the complaint and at the trial that the respondent was negligent in that it failed to warn the decedent of the approach of the train. Rules of the respondent with respect to signals by whistle were offered in evidence. One rule requires that when running against the current of traffic

one long and one short blast of the whistle of the locomotive shall be blown approaching stations, curves or other points where the view may be obscured. This is rule No. 14 (A 34). The same rule requires the sounding of two long and two short blasts of the whistle when a train is approaching public crossings at grade. (A 35)

The only witness who was asked about the blowing of the whistle testified as follows (A 27):

> "Q. Now do you know whether or not or did you hear a whistle blow that morning as the train was coming to the crossing?
>
> A. I don't remember that.
>
> Q. Were you paying any attention to whether or not the whistle was blowing?
>
> A. No."

There was no testimony from which the jury could have found that the signals required by the rules were not given.

It is now contended by the petitioner that, regardless of what signals were given as the train approached the crossing, the engineer and the fireman or one of them should have seen the decedent either standing in a position too close to the track for safety, or moving toward the track, and should have done something to prevent the engine from striking him. Just what they could have done is not made clear.

There was no evidence that either the engineer or fireman saw the deceased in a place of danger. There was no evidence as to what the decedent did after he was seen by the witness Mell standing two or three feet north of the track, or how close the locomotive was when he assumed that position. Mell said it was "pretty close" to the crossing when he saw Fantini in that position. (A 32, 33) There was no evidence that he did not move closer to the track and no evidence of how far the engine overhung the track.

There was no evidence as to what the fireman was doing as the train approached the crossing. There was no evidence that he was not tending the fire in the locomotive. There was uncontradicted evidence that the accident happened on the fireman's side of the engine. (A 26, 27)

There was no evidence that it was possible for the engineer to see Fantini when the latter was in an unsafe place. The tracks curved to the north about 400 feet west of the crossing. (A 33) What view the engineer had of the north side of the crossing does not appear. Certainly it was not shown that Fantini was in a place of danger at any time when the engineer could have seen him.

There was no evidence that the train which was traveling between 30 and 40 miles an hour (A 28) could have been stopped before Fantini was struck if he had been standing in a place of danger, and had been seen standing there as soon as it was possible for either the engineer or fireman to see him.

It has been held consistently by this Court that in an action under the Federal Employers' Liability Act the burden of proving negligence rests upon the plaintiff. *St. Louis & San Francisco Ry. Co. v. Mills,* 271 U. S. 344, 46 S. Ct. 520, 70 L. Ed. 979; *N. O. & N. E. R. Co. v. Harris,* 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167; *B. & O. R. Co. v. Berry,* 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; *D. L. & W. R. Co. v. Koske,* 279 U. S. 7, 49 S Ct. 202, 73 L. Ed. 576; *N. Y. Central R. Co. v. Ambrose,* 280 U S. 484, 50 S. Ct. 198, 74 L. Ed. 562.

In the recent case of *Tennant v. Peoria & Pekin Union Rwy. Co.,* 64 S. Ct. 409, 88 L. Ed. 322, Mr. Justice Murphy said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 ALR

967. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 US 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 US 351, 74 L. Ed. 896, 50 S. Ct. 281."

The contention that in a death case negligence can be inferred because of the presumption that the decedent exercised reasonable care for his own safety has been rejected by this Court. In *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, this Court affirmed a judgment entered on a verdict directed by the trial judge in favor of the defendant. The question was whether or not there was any proof of negligence. Mr. Justice McKenna, in the opinion for this Court, said:

"But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

In the case of *Stewart v. Southern Rwy. Co.*, 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849, a workman received fatal injuries when he went between two cars to adjust a coupler. There was a lever on one of the cars designed to be used in lifting the coupler pin and opening the knuckle. The engineer of the crew testified that he did not see the decedent attempt to use the pin lifter but did see him go between the cars. The administratrix of the decedent contended that,

"in the absence of evidence on behalf of the respondent, as to the condition of the coupler, the jury were

entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler by hand."

The Court refused to sustain this contention.

The petitioner having had the burden of proving negligence on the part of the respondent, and having produced no evidence of negligence, the Court properly directed a verdict for the respondent, and the Circuit Court of Appeals did not err in affirming the judgment.

Point (2).

Certiorari Should Be Denied in This Case.

Petitioner claims that in the case of *Brady v. Southern R. Co.*, 64 S. Ct. 232, 88 L. Ed. 189, this Court held that in *all* cases brought under the Federal Employers' Liability Act, the question as to the sufficiency of the evidence of negligence *must* be decided by this Court in the final instance. It is clear that all the Brady case holds is that whether or not there is sufficient evidence to justify the submission to a jury of a case under the Federal Employers' Liability Act, is a federal question. In that case the Chief Justice said, "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." Certainly it was not held that this Court *must* grant certiorari in every case under the Federal Employers' Liability Act where it is contended by the plaintiff that there was a jury question or by the defendant that there was not such a question.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

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